**IN THE SUPREME COURT**

**APPEAL FROM THE COURT OF APPEALS**
**PRESIDING JUDGE RICHARD ALLEN GRIFFIN**

GARY and KATHY HENRY, et al.

Plaintiffs-Appellees,

vs.

THE DOW CHEMICAL COMPANY,

Defendant-Appellant.

Supreme Court No. 125205

Court of Appeals No. 251234

Saginaw County Circuit Court
Case No. 03-47775-NZ

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# BRIEF OF DEFENDANT-APPELLANT THE DOW CHEMICAL COMPANY

**ORAL ARGUMENT REQUESTED**


KATHLEEN A. LANG (P34695)
BARBARA H. ERARD (P31892)
DICKINSON WRIGHT PLLC
*Counsel for Defendant-Appellant*
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
Telephone: 313-223-3500
Facsimile: 313-223-3598

JOHN A. DECKER (P31078)
BRAUN KENDRICK
FINKBEINER, PLC
*Counsel for Defendant-Appellant*
4301 Fashion Square Boulevard
Saginaw, MI 48603
Telephone: 989-498-2100
Facsimile: 989-799-4666

DOUGLAS KURTENBACH
CHRISTOPHER M. R. TURNER
STEVEN ENGEL
KIRKLAND & ELLIS LLP
*Counsel for Defendant-Appellant*
200 E. Randolph Drive
Chicago, IL 60601
Telephone: 312-861-2000
Facsimile: 312-861-2200

JOHN S. GUTTMAN
BEVERIDGE & DIAMOND, PC
*Counsel for Defendant-Appellant*
1350 I Street, NW, Suite 700
Washington, DC 20005-3311
Telephone: 202-782-6000
Facsimile: 202-789-6190

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## STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction pursuant to its June 3, 2004 Order granting Appellant The Dow Chemical Company's emergency application for leave to appeal from "the October 29, 2003 judgment of the Court of Appeals." (457a); MCR 7.301; MCR 7.302. On August 18, 2003, the Saginaw County Circuit Court denied Dow's motion for summary disposition on Plaintiffs' claims for medical monitoring damages. (159a-161a). The trial court subsequently denied Dow's motion for reconsideration and Dow timely filed an emergency application for leave to appeal with the Court of Appeals. (173a, 348a-376a). After the Court of Appeals denied the application, Dow then timely filed its Emergency Application for Leave to Appeal with this Court. (396a, 397a-436a).

This Court's Order states as follows:

> On order of the court, the motions for immediate consideration, for *pro hac vice* admission of Victor E. Schwartz, and to file briefs amicus curiae are GRANTED. The application for leave to appeal the October 29, 2003 judgment of the Court of Appeals is considered, and it is GRANTED. The motion for a stay is GRANTED. Further proceedings in the circuit court are STAYED until further order of this Court. Other persons or groups interested in the determination of the question presented in this case may move the Court for permission to file briefs amicus curiae.

## STATEMENT OF QUESTIONS INVOLVED

1. Did the trial court err in recognizing Plaintiffs' claims for medical monitoring damages when the Michigan Supreme Court, in *Meyerhoff v. Turner Construction Company*, 456 Mich. 933, 575 N.W.2d 550 (1998), vacated the only authority in Michigan ever to have recognized such claims as actionable?

   Defendant-Appellant, The Dow Chemical Company, answers Yes.

   Plaintiffs presumably will answer No.

   The Saginaw County Circuit Court answered No.

   The Michigan Court of Appeals did not answer this question.

2. Does Michigan law recognize a claim for medical monitoring relief where the Plaintiffs have sustained no past or present physical injury?

   Defendant-Appellant, The Dow Chemical Company, answers Yes.

   Plaintiffs presumably will answer No.

   The Saginaw County Circuit Court answered No.

   The Michigan Court of Appeals did not answer this question.

## I. SUMMARY OF ARGUMENT

Plaintiffs-Appellees have brought this action on behalf of themselves and thousands of putative class members who allegedly have been exposed to dioxin. Plaintiffs seek to recover based upon a novel tort theory, a so-called "medical monitoring" action, which would permit recovery for "medical monitoring" costs, even though it is undisputed that Plaintiffs allege no actual injury. Contrary to established Michigan law, the trial court denied the motion for summary disposition by Defendant-Appellant, the Dow Chemical Company ("Dow") and recognized Plaintiffs' cause of action for medical monitoring despite Plaintiffs' failure to plead any manifest physical injury. Because the trial court's order departs from established Michigan law limiting actionable claims to those based on allegations that plaintiffs have sustained a manifest physical injury, Dow now brings this appeal.

Plaintiffs do not allege that they have suffered any manifest physical injury as a result of dioxin exposure. Their complaints do not assert any such past or present injury. In pursuing their medical monitoring claims before this Court and the courts below, Plaintiffs repeatedly have confirmed that they "do not allege that they are injured for purposes of this claim."[1] Rather, Plaintiffs' medical monitoring claims are based solely upon the allegation that they are at a "significantly increased risk" that they ***may*** develop a "serious latent disease" at some unknown time in the future.

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[1] Pls.' Br. in Opp. to Dow's Mot. for Summ. Disposition at p. 13 n. 5: 149a; *see, eg,* Pls.' Answer to Def.'s Emergency Appl. For Leave filed in the Ct. of Appeals at p. 8: 390a ("Pls.' App. Ct. Answer") (Plaintiffs seek compensation for medical monitoring "absent manifest physical injury").

However, there is no authority in Michigan permitting the trial court to recognize medical monitoring claims where the plaintiff alleges no manifest physical injury. It is a fundamental hallmark of Michigan law that a plaintiff must assert a manifest physical injury at the time of suit. *E.g., Larson v Johns-Manville Sales Corp*, 427 Mich 301; 399 NW2d 1 (1987); *Daley v. LaCroix*, 384 Mich 4, 14; 179 NW2d 390 (1970). Claims for potential future injuries, rather than manifest injuries, are not actionable. *E.g., Adkins v Thomas Solvent Co.*, 440 Mich 293, 314, 319; 487 NW2d 715 (1992); *Wickens v Oakwood Healthcare Sys*, 465 Mich 53; 631 NW2d 686 (2001). Although a plaintiff may seek future damages, "only such future damages can be recovered as the evidence makes reasonably certain ***will necessarily result from the injury sustained***." *King v Neller*, 228 Mich 15, 22; 199 NW 674 (1924) (emphasis added). Applying this principle in the context of toxic tort claims, this Court has ruled that a cause of action does not accrue upon mere exposure to a toxic substance but instead accrues when an injury manifests as a physical harm or illness. *Larson*, 427 Mich 301 (1987). Consistent with this precedent, when the Court of Appeals in *Meyerhoff* recognized a claim for medical monitoring damages as actionable even though the plaintiffs in that case had alleged no physical injury, this Court vacated that decision and thereby rejected such medical monitoring claims. *Meyerhoff v. Turner Construction Co*, 456 Mich 933; 575 NW2d 550 (1998).

The trial court below erred by departing from this line of authority and permitting Plaintiffs to pursue claims for medical monitoring even though they did not allege that they had suffered an actual physical injury. In denying Dow's dispositive motion, the

trial court's sole Michigan authority was the Court of Appeals' decision in *Meyerhoff.* However, this Court vacated that decision and ***erased*** the only authority in Michigan that ever has recognized medical monitoring claims as actionable, thereby ***rejecting*** medical monitoring claims by uninjured plaintiffs. Consequently, the trial court's decision deviates from Michigan law by recognizing medical monitoring claims that are not based upon any legally cognizable injury.

Expanding Michigan law to include such claims based upon the mere allegation of a risk of some future injury would have ominous consequences for litigants, truly injured plaintiffs, and Michigan's judicial system. Michigan tort law provides plaintiffs with a remedy when they have suffered a manifest physical injury. Abandoning this cornerstone of Michigan tort law would open the courts to a host of speculative and uncertain claims. As recognized by several high courts, including the United States Supreme Court, permitting such medical monitoring relief would overwhelm the courts with a flood of litigation with no reliable basis to separate valid from invalid claims, and misallocate scarce medical and judicial resources away from serious claims to those asserting no legally protected interest.[2] Thus, the trend among state high courts and other courts addressing such claims has been to refuse to depart from bedrock principles of the common law and to reject this novel theory of recovery for medical monitoring.

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[2] *Metro-North Commuter RR Co v. Buckley*, 521 US 424, 117 S Ct 2113, 138 L Ed 2d 560 (1997); *Wood v Wyeth-Ayerst Labs*, 82 SW3d 849, 855 (Ky 2002); *Hinton v Monsanto Co*, 813 So2d 827 (Ala 2001); *Badillo v American Brands, Inc*, 16 P3d 435 (Nev 2001).

Ultimately, Plaintiffs' attempt to establish a new theory of tort liability is nothing more than a request for legislation altering healthcare and environmental policy in this state. Plaintiffs ask this Court to step into the role of the Legislature and create a new cause of action and new class of plaintiffs. But any adoption of a medical monitoring cause of action would require the balancing of complex policy considerations and cost-benefit analyses that should be reserved for the Legislature.

## II. STATEMENT OF FACTS

### A. Plaintiffs' Allegations And The Proceedings Below.

Plaintiffs are 173 individuals who filed this action, on behalf of themselves and a putative class of thousands of persons who have resided at some time since 1984 near the Tittabawassee River in Saginaw County. Each asserts a claim for medical monitoring as well as various property claims. (Third Am. Compl.: 235a-277a). Plaintiffs contend that Dow's historical industrial activities in Midland have deposited dioxins in portions of the flood plain near the Tittabawassee River. Plaintiffs allege that as a result of the presence of these dioxins the values of their real estate properties have diminished (*id.* ¶¶ 154, 167-190: 261a, 264a-268a) and they "suffer significantly increased risk of contracting a serious latent disease." (*Id.* ¶ 213: 272a).

#### 1. Plaintiffs assert no manifest injury as a result of dioxin exposure.

It is undisputed that Plaintiffs do not claim that they have suffered from ***any*** manifest physical injury as a result of dioxin exposure. Neither Plaintiffs' original complaint nor any of the three amended complaints subsequently filed in this action

alleges any such past or present injury.[3] Furthermore, in pursuing their medical monitoring claims, Plaintiffs have confirmed that they "do not allege that they are injured for purposes of this claim."[4] Nor do Plaintiffs allege to have incurred any past or current medical expenses which they seek to recover. To the contrary, Plaintiffs have emphasized that they "***have not*** requested an award of medical monitoring damages to compensate for current or future damages."[5] In fact, in seeking certification of a proposed medical monitoring class, Plaintiffs continue to argue in the court below that they assert ***no injuries*** in support of their medical monitoring claims. (*See* 10/28/2003 Hr'g Tr at p. 52: 485a ("As much as it seems Dow wanted us to, we have not and do not assert claims for personal injury.") (Statement of then-lead Plaintiffs' counsel, Jan P. Helder, Jr.); Pls.' Reply Mem. in Support of Mot. for Class Cert. at p. 47: 331a ("Pls.' Class Cert. Reply") ("In fact, counsel for Plaintiffs are unaware of any existing claim for personal injuries by any putative class member that would meet the legal standard necessary to pursue such a claim against Dow at this time."); *id.* at p. 57: 341a ("Each class member is unsure whether he or she will actually fall ill.")). Thus, not one Plaintiff in this case alleges sickness, physical impairment, or clinically detectable changes of any kind. Instead, Plaintiffs' medical monitoring claims are based solely upon "serious latent

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[3] *See* Class Action Compl.: 3a-33a; First Am. Compl.: 54a-94a; Second Am. Compl.: 95a-136a; Third Am. Compl.: 235a-277a.

[4] Pls.' Br. in Opp. to Dow's Mot. for Summ. Disposition at p. 13 n. 5: 140a; *see* Pls.' App. Ct. Answer at p. 8: 390a (Plaintiffs seek compensation for medical monitoring "absent manifest physical injury").

[5] Pls.' Answer to Def.'s Emergency Appl. For Leave To Appeal To Sup. Ct. at p. 4: 444a ("Pls.' Sup. Ct. Answer") (emphasis in original); *see* Pls.' App. Ct. Answer at p. 2: 384a.

disease[s]" that might develop in connection with Plaintiffs' alleged "significantly increased risk." (Third Am. Compl. ¶ 213: 272a; *see id.* ¶ 211: 272a (alleging Plaintiffs have "a substantially greater risk of suffering the various diseases and conditions associated with Dioxin"), ¶ 216: 272a (alleging "increased susceptibility to injuries")).

**2. These 173 plaintiffs seek to bring medical monitoring claims on behalf of thousands of current and former Michigan residents.**

Plaintiffs seek to bring this action on behalf of two distinct classes of individuals. In connection to their property claims, Plaintiffs purport to represent "all persons who own real property within the one hundred year floodplain of the Tittabawassee River (the 'Flood Plain') in Saginaw County, Michigan on February 1, 2002 (the 'Property-Owner [Class]')." (Third Am. Compl. ¶ 156: 261a). Plaintiffs pursue their medical monitoring claims on behalf of an even broader class consisting of "all persons who lived on property located in the flood plain," described in Plaintiffs' complaint as "Flood Plain, in Saginaw County, Michigan on January 1, 1984 to [the] present (the 'Medical Monitoring Class')." (*Id.* ¶ 157: 261a). Plaintiffs contend that this class, which would comprise any individual who ever has resided on thousands of properties purportedly located in the "flood plain" for any length of time since 1984, possibly consists of more than 2,000 unidentified persons. (*See* Pls.' Class Cert. Reply at p. 35: 319a).

Since filing their action, the number of named Plaintiffs asserting medical monitoring claims steadily has escalated. Twenty-six Plaintiffs originally filed this action in March 2003. In May 2003, Plaintiffs filed a First Amended Complaint naming 117 additional plaintiffs. Less than a month later, Plaintiffs filed a Second Amended

Complaint naming a total of 179 plaintiffs. After the trial court denied Dow's motion to dismiss the medical monitoring action, Plaintiffs moved to add yet another 135 named plaintiffs to this litigation. However, after the trial court clarified that any new named Plaintiffs would be subject to discovery, Plaintiffs' counsel withdrew their request to name more plaintiffs and, apparently, has since deferred asserting such claims by more individuals. (12/15/2003 Hr'g Tr at pp. 19-21: 493a-495a).

Meanwhile, class certification proceedings have pressed forward before the trial court below. In support of these putative classes, Plaintiffs have filed a Motion for Class Certification which has been briefed. In preparation for a class certification hearing, the Court provided Dow with only limited discovery, denying its motion to compel discovery of medical records and other medical discovery on the proposed class representatives, holding that such evidence would not be relevant to issues of class certification. (11/07/2003 Order on Informal Disc. of Non-named Non-represented Putative Class Members: 174a-175a).

### 3. Plaintiffs' asserted medical monitoring cause of action.

Plaintiffs seek medical monitoring as an independent cause of action set forth as a separate count in each of their complaints. (*See, e.g.,* Third Am. Compl. Count VI: 271a-273a). In this count, Plaintiffs demand that Dow pay monies for "a court-supervised medical monitoring trust fund to provide for a medical monitoring program." (*Id.* ¶ 216: 272a-273a; *see id.* ¶¶ 217, 219(g): 273a-275a (requesting "a medical monitoring program funded by Defendant")). Other than conclusory demands for a program for "ongoing testing and monitoring," Plaintiffs provide no guidance concerning the parameters or

identity of the "medical monitoring" sought. Likewise, Plaintiffs do not specify the latent disease or diseases for which they allegedly are at an increased risk. Rather, they allege only that dioxin exposure, at undefined doses, supposedly "causes" a number of vaguely defined medical conditions: "cancer, liver damage, hormone changes, reproductive damage, miscarriages, birth defects, and . . . decreased . . . ability to fight infection." (*Id.* ¶ 128: 254a). However, in addition to seeking unspecified "monitoring procedures," Plaintiffs demand that Dow finance a variety of projects that normally would be conducted by a would-be plaintiff before asserting a tort claim, including studying any effects of dioxin on putative class members and collecting medical data on them. (*See id.* ¶¶ 216(a, b, e), 219(g): 272a-275a); MCR 2.114(D)(2) (party signing pleading verifies that, after reasonable inquiry, it is well grounded in fact and warranted by existing law). As Plaintiffs characterized their medical monitoring claims in pursuing class certification, they seek "medical monitoring to allow class members to monitor whether they may have or could be developing physical ailments attributable to Dow's dioxin." (Pls.' Class Cert. Reply at p. 55: 339a; *see id.* (noting that "this medical monitoring may lead at some future time to personal injury suits")). In fact, through their medical monitoring claim, Plaintiffs seek to bypass obstacles to future legal action by demanding funds now for the "care and treatment of resultant medical conditions" and for "research into possible cures" of unidentified medical conditions, apparently without any legal determination as to whether a Plaintiff's hypothetical future physical injury is in fact caused by dioxin exposure and any tortuous conduct by Dow. (Third Am. Compl. ¶¶ 217, 219(g)(ii): 273a-275a).

### B. Rulings by the Trial Court and Court of Appeals.

In light of Plaintiffs' failure to allege a manifest physical injury, Dow moved for summary disposition under MCR 2.116(C)(8). In support of its motion, Dow argued that the cause of action for medical monitoring damages should be dismissed because Michigan law does not recognize claims for medical monitoring damages (or other tort claims) in the absence of a manifest physical injury, and that as many other courts have recognized, including the United State Supreme Court, expanding tort law to allow such claims could flood the courts with speculative claims threatening unlimited and unpredictable liability. (Dow's Mot. for Summ. Disposition: 137a-156a; 7/21/2003 Hr'g Tr at pp. 5-21, 60-68: 461a-465a, 475a-477a).[6]

On August 18, 2003, relying upon the Court of Appeals' vacated decision in *Meyerhoff v Turner Construction Company*, 202 Mich App 499; 505 NW2d 847 (1993), the trial court issued an Order and Opinion ("August 18 Order") denying Dow's motion for summary disposition as to the Plaintiffs' medical monitoring claims.[7] (8/18/2003 Order at p. 4: 160a). In denying Dow's dispositive motion, the trial court appeared to rely upon this Court's Order vacating the Court of Appeals' *Meyerhoff* decision in which it stated that: "The factual record is not sufficiently developed to allow a medical

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[6] Dow preserved its arguments in this appeal by raising them at pp. 9-15 of its brief in support of summary disposition, at oral argument before the trial court on July 21, 2003, and in its brief in support of reconsideration, filed with the Circuit Court. (145a-151a, 164a-172a).

[7] In the same motion, Dow also sought summary disposition of the plaintiffs' claims for punitive damages as well as Plaintiffs' property claims for trespass and strict liability on abnormally hazardous activity. In the August 18 Order, the Circuit Court granted Dow's motion in part and dismissed each of these claims. That portion of the Order is not the subject of this appeal.

monitoring damages." (*Id.*: 160a) (quoting from *Meyerhoff v Turner Construction Co*, 456 Mich 933) (1998). Apparently, the trial court read this Court's decision as precluding summary adjudication prior to discovery because, in denying Dow's motion and ruling, the trial court stated that "Plaintiffs should be given the opportunity to develop a record regarding medical monitoring." (8/18/2003 Order at p. 4: 160a). The trial court denied Dow's timely motion for reconsideration on September 10, 2003. (173a).

Dow then timely filed an Emergency Application for Leave to Appeal and Motion for Peremptory Reversal with the Court of Appeal, asking the Court either to peremptorily reverse the trial court's manifestly erroneous decision or, in the alternative, to grant Dow's Emergency Application and stay all proceedings relating to these claims until the appeal was decided. A divided Court of Appeals' panel denied the motion for interlocutory relief on October 29, 2003. With regard to the Application, the majority stated that "the application for leave to appeal is DENIED for failure to persuade the Court of the need for immediate appellate review." (396a). Judge Owens, in dissent, would have granted Dow's application for leave and stayed of the action below.

On December 10, 2003, Dow timely filed its Emergency Application for Leave to Appeal of Defendant-Appellant The Dow Chemical Company. (437a-456a). This Court granted Dow's application for immediate appeal and stayed the proceedings in the trial court on June 3, 2004. (457a).

## III. ARGUMENT

### A. Standard Of Review.

This Court reviews *de novo* the trial court's denial of Dow's motion for summary disposition of Plaintiffs' medical monitoring claims. Whether a claim is legally actionable is a question of law subject to *de novo* review. *E.g., Mack v City of Detroit*, 467 Mich 186, 193, 197; 649 NW2d 47, 51, 53 (2002). In addition, because a motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the basis of pleadings alone, *de novo* review applies to a trial court's decision denying summary disposition for failure to state a claim. *See Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817, 823-24 (1999). The trial court must grant the motion if no factual development could justify the plaintiff's claim for relief. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201, 204 (1998).

### B. The Trial Court Erred In Relying On *Meyerhoff* To Recognize Plaintiffs' Claims For Medical Monitoring Relief.

In its August 18 Order, the trial court clearly erred by recognizing medical monitoring as a cause of action absent a manifest injury. In denying Dow's motion for summary disposition, the trial court erroneously relied on the Court of Appeals' vacated decision in *Meyerhoff v Turner Construction Company*, 202 Mich App 499; 509 NW2d 847 (1993) and misunderstood this Court's 1998 *Meyerhoff* order vacating that decision. Consistent with established principles of Michigan law, this Court's 1998 *Meyerhoff* order vacated the ***only*** Michigan authority that ever has recognized claims for medical monitoring damages absent a manifest physical injury as actionable. The trial court

clearly erred by declining to follow this Court's guidance in *Meyerhoff* and instead adopting a novel cause of action rejected by this Court and contrary to longstanding principles of Michigan common law.

### 1. The *Meyerhoff* case and opinions.

Plaintiffs in *Meyerhoff* were a group of construction workers who asserted that they had been exposed to asbestos during the their employment, subjecting them to an increased risk of contracting serious physical diseases. *Meyerhoff v Turner Construction Co*, 210 Mich App 491, 492-93; 534 NW2d 204 (1995). Despite alleging no presently identifiable physical injuries at the time of their suit, these plaintiffs sought damages for expenses associated with medical monitoring of their physical condition and for emotional distress suffered as a consequence of their heightened fear of developing a serious physical disease. After defendants moved for summary disposition under MCR 2.116(C)(8), the trial court "granted the motion on the basis that plaintiffs did not allege an underlying injury, and that, therefore, their claim was premature." *Id.*

The Court of Appeals disagreed and held that "[m]edical monitoring expenses are a compensable item of damages" even where no physical injury is alleged. *Meyerhoff*, 202 Mich App at 505. In adopting what the Court of Appeals itself characterized as a "nontraditional tort[]," the panel cited ***no*** Michigan precedent. Instead, it relied upon only a handful of decisions applying the laws of other jurisdictions in concluding that the

trial court erred in dismissing the claims "on the basis that plaintiffs failed to allege an underlying injury or some manifestation of disease."[8] *Id.* at 504-05.

This Court twice granted review and twice vacated the appellate court's medical monitoring opinions. Originally, this Court vacated the entire 1993 Opinion and asked the Court of Appeals to address the trial court's decision to take judicial notice of certain facts prior to ruling. After remand, the Court of Appeals corrected its error but sought to reinstate its previous medical monitoring decision, specifically ruling that it "reaffirm[ed] [its] prior holding that medical monitoring expenses are a compensable item of damages." *Meyerhoff*, 210 Mich App at 495. This Court, however, again granted review – this time specifically to address whether "the Court of Appeals erred in recognizing a cause of action resulting in damages for medical monitoring where plaintiff has not yet sustained physical illness or physical injury." *Meyerhoff v Turner Construction Co*, 454 Mich 873; 562 NW2d 781 (1997). After argument, this Court again vacated the "portion of the Court of Appeals decision which holds that medical monitoring expenses are a compensable item of damages," ruling that the medical monitoring action should be dismissed because "[t]he factual record is not sufficiently developed to allow [sic] medical monitoring damages." *Meyerhoff*, 456 Mich at 933.

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[8] In contrast, the Court of Appeals reviewed and relied on an established line of Michigan precedent requiring an "objective and definite physical injury" to affirm the trial court's dismissal of the plaintiffs' claims for emotional distress. *See id.* at 506.

**2. By twice vacating the Court of Appeals' efforts to create medical monitoring claims absent physical illness or injury, this Court has rejected such claims.**

The trial court's August 18 Order is based on a fundamental misinterpretation of the Supreme Court's 1998 *Meyerhoff* decision. When this Court vacated the Court of Appeals' opinion for the second time, it explained, in part, that "[t]he factual record is not sufficiently developed to allow [sic] medical monitoring damages." In denying Dow's dispositive motion, the trial court relied upon the Court of Appeals' *Meyerhoff* decision, and then apparently read this Court's *Meyerhoff* order as requiring that: "Plaintiffs should be given the opportunity to create a record regarding medical monitoring damages." (8/18/2003 Order at p. 4: 160a).

Contrary to the trial court's ruling, however, this Court's 1998 Order expunged any recognition of a claim for medical monitoring where a plaintiff alleges no manifest physical injury. This Court has twice vacated the Court of Appeals' opinions, the second time explicitly ruling to "VACATE that portion of the Court of Appeals decision which holds that medical monitoring expenses are a compensable item of damages." *Meyerhoff*, 456 Mich at 933. ***To vacate*** means "to annul; to set aside; to cancel or rescind. To render an act void; to vacate an entry of record or a judgment." BLACK'S LAW DICTIONARY 1075 (6th ed. 1991) (501a). Thus, to the extent that the trial court in the present case relied upon the vacated Court of Appeals' decisions, this was clear error.

The trial court, however, apparently took this Court's statement in *Meyerhoff* as an invitation to uninjured individuals to file medical monitoring claims in order to develop a "sufficient" record to support them. That was wrong. In its *Meyerhoff* decision, this

Court rejected the plaintiffs' medical monitoring claims based on the legal deficiency of the factual allegations in the plaintiffs' pleadings. This was the sole reason that the Court provided for review of the decision in 1997. If the Court had found the legal deficiency in the *Meyerhoff* plaintiffs' claims to be a lack of factual evidence supporting their allegations, then presumably the Court would have remanded with instructions to permit discovery. But instead the Court vacated the Court of Appeals' decision and ordered that the claim be dismissed because, even if a factual record were developed, the plaintiffs could not state a claim as a matter of law. Because on a motion for summary disposition, all of plaintiffs' factual allegations are take to be true, the Court's reference to the insufficiency of the factual record addressed the absence of ***any allegations*** identifying a manifest physical injury upon which the plaintiffs' medical monitoring claims could be based. Indeed, *Meyerhoff* makes clear that it was improper for the trial court to have even considered facts beyond those alleged in plaintiffs' complaint when ruling on the motion to dismiss under MCR 2.116(C)(8).

Plaintiffs' medical monitoring claims here suffer from the same legal deficiency as the plaintiffs' allegations in *Meyerhoff*: Both assert only a "risk" of injury and fail to allege a manifest physical injury. In fact, Plaintiffs here have clarified over and over that they "do not allege that they are injured for purposes of this claim." (Pls.' Br. in Opp. to Dow's Mot. for Summ. Disposition at p. 13 n. 5: 149a; *see, e.g.,* 10/28/2003 Hr'g Tr at p. 52: 485a ("As much as it seems Dow wanted us to, we have not and do not assert claims for personal injury.")). By vacating the Court of Appeals' decision in *Meyerhoff*, this Court definitively rejected the appellate court's departure from established law and

so precluded the trial court's recognition of the Plaintiffs' medical monitoring claims here.

### C. Michigan Law Does Not Recognize A Claim For Medical Monitoring Relief Where The Plaintiff Has Not Alleged A Manifest Physical Injury.

This Court's 1998 *Meyerhoff* decision is consistent with the established common law principle, both in Michigan and elsewhere, that a claim seeking to recover solely for potential future injuries is not actionable. The requirement of a manifest physical injury for recovery in tort has been the hallmark of Michigan common law for over one hundred years. To date, neither the Michigan Legislature nor this Court ever has decided to abandon this principle and enter into the uncharted territory of experimental tort law. As toxic tort litigation based upon latent injuries has emerged, Michigan and most other jurisdictions have continued to apply this bedrock principle to find that a cause of action accrues upon manifestation of a physical injury, not at mere exposure or risk of future disease. The trial court's decision to abandon the manifest physical injury requirement would disregard this long line of authority and would radically expand tort liability in Michigan by opening it to a flood of speculative claims.

#### 1. Manifest physical injury at the time of suit is the hallmark of compensable tort injury.

Under established common law tort principles, "injury is always a prerequisite condition of liability and without injury no right of action can exist." Thomas Atkins Street, THE FOUNDATIONS OF LEGAL LIABILITY 493 (1906) (581a). Thus, to support a negligence claim, traditional tort law requires that the plaintiff suffer an actual,

manifested injury. "The threat of a future harm, not yet realized, is not enough." PROSSER & KEETON ON THE LAW OF TORTS § 30 at 165 (5th ed. 1984) (509a). Under the Restatement (Second) of Torts, in order to recover any damages suffered, a plaintiff must prove an existing injury that gave rise to those damages. *See* RESTATEMENT (SECOND) OF TORTS § 7 & cmt a (515a-516a) (contrasting "harm" from "injury" because "harm implies the existence of loss or detriment in fact, which may not necessarily be the invasion of a legally protected interest"); *Id.* § 902 & cmt a (531a) ("Damages flow from an injury."); *id.* § 388 & cmt e (519a-520a, 522a) (liability for negligent failure to warn "exists only if physical harm is caused").

Accordingly, for a plaintiff to recover the cost of future medical procedures or expenses, the plaintiff must prove that he has suffered a present physical injury and that the claimed future expenses are reasonably certain to be incurred as a result of that injury. Jacob A. Stein, STEIN ON PERSONAL INJURY DAMAGES § 5.18, at 247 (2d ed. 1991) (577a) ("There must be evidence of a continuing or permanent disability and the necessity of future medical treatment of the disability"); Charles T. McCormick, HANDBOOK OF DAMAGES § 90 at 323 (1935) (505a) . Like other jurisdictions, Michigan has adopted this common law rule. *See, e.g., Prince v Lott*, 369 Mich 606, 609; 120 NW2d 780, 781 (1963) (to recover future damages, "there must be such degree of probability of such consequences as to amount to reasonable certainty that they will result from the original injury") (citation omitted); *King v Neller*, 228 Mich 15, 22; 199 NW 674, 676 (1924) ("only such future damages can be recovered as the evidence makes reasonably certain will necessarily result from the injury sustained").

### 2. The requirement of a manifest physical injury is well established in Michigan law.

The Michigan Legislature and this Court have recognized these well-established common law principles and consistently required an actual physical injury to recover in tort. *See, e.g.*, 1 TORTS: MICHIGAN LAW & PRACTICE, GENERAL NEGLIGENCE PRINCIPLES § 1.31 (ILCE 2003 Supp) (586a) ("Actual harm or injury to a plaintiff's person or property is an essential element of the plaintiff's prima facie case in negligence."). To preclude recovery from speculative and remote claims, for over one hundred years, the Michigan Supreme Court has required plaintiffs to prove an existing physical injury to recover emotional distress damages. In 1899, this Court affirmed that "a plaintiff cannot recover for injuries occasioned by fright, where there is no immediate personal injury." *Nelson v Crawford,* 12 Mich 466, 468; 81 NW 335 (1888) (quotation marks omitted). The Court refused to expand recovery to such damages that did not arise from a physical injury because they were too speculative. Quoting the court below with approval, this Court explained that the "'difficulty which often exists in the cases of alleged physical injury . . . would not only be greatly increased, but a wide field would be opened for fictitious and speculative claims.'" *Id.*; *see, e.g., Manie v Matson Oldsmobile-Cadillac Co*, 378 Mich 650, 655; 148 NW2d 779 (1967).

Even after this Court overruled the immediate physical impact requirement, it reaffirmed the fundamental cornerstone of a manifest physical injury: to recover for emotional distress, a plaintiff must allege and prove that "***a definite and objective physical injury*** is produced as a result of emotional distress proximately caused by

defendant's negligent conduct." *Daley v LaCroix*, 384 Mich 4, 12-13; 179 NW2d 390 (1970) (emphasis added); *see Bogaerts v Multiplex Home Corp of Mich*, 423 Mich 851; 376 NW2d 113 (1985) (vacating emotional distress damages where the plaintiff failed to allege and prove a sufficient physical injury). In *Daley*, this Court held that a plaintiff could recover emotional distress damages even absent "any physical impact . . at the time of mental shock," but retained the requirement that the plaintiff must have suffered a manifest physical injury at the time of suit. *Daley*, 384 Mich at 12-13. Accordingly, in interpreting Michigan law, a federal court has since properly concluded that a plaintiff also may not recover a claim for fear of contracting a disease unless he establishes that his emotional distress has manifested itself as a "definite and objective physical injury." *Stites v Sunstrand Heat Transfer, Inc.*, 660 F Supp 1516, 1526 (WD Mich 1987).

This principle continues to guide Michigan tort law today. This Court applied the same principle to property damage claims by refusing to expand the Michigan law of nuisance to permit the recovery of damages absent a manifest injury to property. *Adkins v Thomas Solvent Co*, 440 Mich 293; 487 NW2d 715 (1992). In *Adkins*, property owners brought nuisance claims against a nearby chemical plant alleging that industrial activities had polluted the surrounding area. The plaintiffs did not allege that their property was contaminated; rather they alleged only that the fear of contamination had diminished their property values. This Court rejected plaintiffs' claims, holding that they alleged "*damnun absque injuria* – a loss without an injury in the legal sense." *Adkins*, 440 Mich at 314. In so doing, the Court recognized that abandoning the traditional injury requirement by permitting actions based upon unrealized fears might ultimately obstruct

the recovery of plaintiffs who have suffered an actual injury: "The ultimate effect might be a reordering of a polluters' resources for the benefit of persons who have no cognizable harm at the expense of those claimants who have been subjected" to an actual injury. *Id.* at 318-19.

In a similar vein, this Court recently recognized that a living plaintiff may not pursue a cause of action based solely upon either the reduction in a chance of survival or a shortened life span. The Court reasoned that allegations of a shortened life assert only ***potential*** rather than ***present*** injuries until such time as death occurs and, as a result, without a present injury, there is no claim for damages. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53; 631 NW2d 686 (2001); *Weymers v Khera*, 454 Mich 639; 563 NW2d 647 (1997); *see also, e.g., Colbert v Conybeare Law Office*, 239 Mich App 608, 619-20; 609 NW2d 208 (2000) (holding that a claim for legal malpractice "requires a showing of an actual injury caused by the malpractice, not just the potential for injury").

### 3. Mere exposure, absent a presently manifested physical injury, cannot constitute the basis for a cause of action.

Faced with this emerging phenomenon of toxic tort litigation, this Court, like other courts across the United States, has continued to require that the plaintiff has sustained a manifest physical injury before any cause of action will accrue, even where detrimental harm might arise years after exposure to a chemical. Alleging mere exposure, an individual might never suffer any detrimental harm or illness. And any physical harm might not arise until years later. Addressing such claims, this Court not only has

concluded that the physical injury requirement remains viable, but further has clarified that a cause of action accrues only upon manifestation of a physical harm or illness.

In *Larson v Johns-Manville Sales Corp,* 427 Mich 301, 399 NW2d 1 (1987), this Court reaffirmed the continuing vitality of the injury requirement when it held that no cause of action accrues from a toxic exposure until a physical injury manifests through measurable symptoms. In *Larson*, this Court examined when an action would accrue from occupational exposure to asbestos dust under Michigan tort law. The decision involved four wrongful death claims, two pursued by decedents suffering from asbestosis and two pursued by decedents suffering from lung cancer following asbestosis. In resolving the defendants' statute of limitations defense, the Court was required to determine whether plaintiffs' causes of action had accrued at the time of their exposure to asbestos or only after the resulting disease had manifested itself. In that context, recognizing that exposure occurs long before disease may develop, the Court concluded that a cause of action cannot arise until the asbestos exposure manifests itself as an injury:

> If a worker files suit on the day he commences or terminates employment which involves breathing asbestos dust, he may as yet have no signs of developing asbestosis. ***Such a suit would be readily dismissed since there has been no injury***, and thus, "no cause of action shall have accrued . . . ."

*Id.* at 311 (emphasis added) (quoting *Strickland v Johns-Manville Int'l Corp*, 461 F Supp 215, 217 (SD Tex 1978)).

Acknowledging the prospect of speculative and uncertain claims, *Larson* further held that the causes of action for lung cancer would not accrue until the plaintiffs in fact

had developed lung cancer. In support, the Court reasoned that plaintiffs with asbestosis could not recover for the possibility of contracting cancer because future damages must be reasonably certain to result from an existing injury. *Larson*, 427 Mich at 317 ("[I]n order to recover damages on the basis of future consequence, it is necessary for a plaintiff to demonstrate with 'reasonable certainty' that the future consequences will occur.") (citations omitted). The Court found that "discouraging suits for relatively minor consequences of asbestos exposure will lead to a fairer allocation of resources to those victims who develop cancers." *Id.* at 319. Thus, rather than open the courts to claims where the latent injury has not and may never emerge, this Court concluded that claims for lung cancer should not accrue until that disease manifests. *Id.*

**4. Plaintiffs' claims for medical monitoring are not based upon any legally cognizable injury.**

Because Plaintiffs allege no manifest physical injury, permitting them to pursue their medical monitoring cause of action would require this Court to expand Michigan tort law and open Michigan courts to speculative and uncertain claims. Plaintiffs admit that they "do not allege that they are injured for purposes of this claim." (Pls.' Br. in Opp. to Dow's Mot. for Summ. Disposition at p. 13: 149a; *see generally supra* at Part II.A.1). As Plaintiffs explain, their claims stand in stark "contrast" to the claims addressed in Michigan precedent such as *Daley, Adkins* and *Larson* that "all related to tort damages where the relief sought compensated for actual harm." (Pls.' Sup. Ct. Answer at p. 11: 451a).

Yet, in an effort to minimize the departure of such claims from Michigan tort law, Plaintiffs quote the Court of Appeals' assertion in its vacated decision in *Meyerhoff* that: "'a reasonable need for medical examinations is itself compensable without proof of other injury.'" (*Id.* at p. 13: 453a) (quoting *Meyerhoff*, 210 Mich App at 502). However, this declaration only begs the question. Whether an alleged need for future medical monitoring – without any manifest physical injury – constitutes a legally cognizable injury under Michigan law is the issue to be resolved. Instead of addressing ***any*** Michigan precedent, the Court of Appeals in its vacated *Meyerhoff* opinion simply relied upon the decision of the D.C. Circuit in *Friends For All Children, Inc v Lockheed Aircraft Corporation,* 746 F2d 816 (DC Cir 1984) which, in turn, relied only upon the definition of "injury" in the RESTATEMENT (SECOND) OF TORT § 7: "the invasion of any legally protected interest of another." *Id.* at 826. But the D.C. Circuit simply assumed, like the Court of Appeals in *Meyerhoff*, that avoiding medical examinations would be a "legally protected interest." It never explained why that is the case.[9]

Medical monitoring is a method by which an individual determines whether he or she has sustained an injury. Aside from any medical monitoring claims, if a medical examination reveals a physical injury, then the plaintiff may pursue a cause of action in tort to recover all damages arising from that injury, including the cost of any medical examinations. However, if a medical examination is negative, then there is no injury and,

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[9] This is not surprising given that the *Friends* decision addressed a claim for incurred costs for medical testing for plaintiffs who in fact had suffered traumatic head injuries, including "a neurological development disorder generally classified as Minimal Brain Dysfunction," from an explosive decompression and subsequent crash while riding an airplane. *See Friends*, 746 F2d at 819-20.

consequently, no potential cause of action. Plaintiffs here seek to recover future diagnostic testing for diseases and health conditions that may never occur. As with claims for emotional distress where there is no objective or definite physical injury, permitting such medical monitoring claims by uninjured plaintiffs would drastically expand tort law.

Without the cornerstone of a manifest physical injury, the claim for medical monitoring loses any definitive evidentiary filter to screen which potential litigants would actually hold a valid claim. Exposure to a chemical does not constitute an injury. Rather, exposure to chemicals is an ongoing process that occurs in most persons in industrialized society. *See Metro-North Commuter RR Co v Buckley*, 552 US 424, 434, 442 (1997); *Ball v Joy Mfg Co*, 755 F Supp 1344, 1372 (SD W Va 1990), *aff'd*, 958 F2d 36 (4th Cir 1991). While acknowledging that they are adopting a "non-traditional," independent tort, courts recognizing claims for medical monitoring absent physical injury do not require proof that the exposure will certainly or even probably result in any sickness or disease. *See, eg, In re Paoli RR Yard PCB Litig*, 916 F2d 829, 849 (3d Cir 1990); *Hansen v. Mountain Fuel Supply Co*, 858 P2d 970, 977 (Utah 1993). These courts forego any traditional semblance of the fundamental element of any claim that the defendant's conduct in fact more probably than not caused a disease or other injury and, in its place, substitute the problematic element of "an increased risk" or "significant risk." *See Hansen*, 858 P22 at 979; *Paoli*, 916 F2d at 852.

However, the element of "increased risk" of disease does not substitute for the physical injury or causation requirements. To do so would impose liability based upon

an amorphous concept that is not even tied to an event that necessarily will occur: namely, "increased risk." Not surprisingly, even those courts adopting medical monitoring claims have yet to definitively quantify any degree of exposure or increased risk, in even approximate terms, necessary to maintain an action. *See, eg, In re Paoli RR Yard PCB Litig,* 35 F3d 717, 788 (3d Cir 1994) ("*Paoli II*"); *Hansen*, 858 P2d at 979 (holding that "[n]o particular level of quantification is necessary to satisfy this requirement"). But the risks of future disease from exposure to a chemical may be infinitely small, if they exist at all. For example, a 1-in-100,000 risk of developing a disease from exposure would equate to a 99,999-in-100,000 chance that the plaintiff will never develop the disease. This is a virtual certainty that the exposure will not result in disease. Nevertheless, some courts have permitted medical monitoring claims to proceed even where the plaintiffs' experts offer only such a risk of future disease. *See Paoli II*, 35 F3d at 794 (permitting plaintiffs to proceed based upon lifetime risk of cancer of 1-in-100,000); *Redland Soccer Club, Inc v Dep't of Army*, 55 F3d 827, 847 (3d Cir 1995) (permitting plaintiffs to proceed based upon 1-in-1,000,000 lifetime risk of cancer). With an evidentiary burden so amorphous, plaintiffs virtually always will be able to locate an "expert" who is willing to testify to a medical theory of "risk" for a fee. *See Paoli II*, 35 F3d at 794 (plaintiffs' expert testifying that program was required for anyone exposed to even a single molecule of PCB); *Stoleson v. United States*, 708 F2d 1217, 1222 (7th Cir 1983) ("There is not much difficulty in finding a medical expert witness to testify to virtually any theory of medical causation short of the fantastic."). Consequently, any

exposure to potentially harmful chemicals would result in litigation based upon nothing more than speculative fears of future injury and costs.

**5. A manifest physical injury is required regardless of whether medical monitoring is characterized as a cause of action, an item of damages, or injunctive relief.**

Plaintiffs have asked the Court to ignore this precedent because, Plaintiffs argue, they merely seek injunctive relief. (*See* Pls.' Sup. Ct. Answer at p. 11: 451a). Plaintiffs contend that, where injunctive relief is sought, they need only allege that the denial of relief "will result in irreparable harm," rather than allege any physical injury. (*Id.*). As an initial matter, Plaintiffs' claims for medical monitoring are claims for money damages dressed up as injunctive relief. Although Plaintiffs use the term, a "court-supervised program" of medical monitoring, what they really seek is an order compelling the defendant to fund medical examinations and treatment for Plaintiffs. Compelling the payment of monies to finance future medical expenses constitutes monetary damages. Even the "research" and other programs sought in Plaintiffs' complaints are nothing more than requests for monies to be paid by Dow into a fund for Plaintiffs. These claims do not in involve any true injunction – *i.e.*, an order directed at defendants that requires them to do or refrain from doing a particular act.[10] "A plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money." *Jaffee v United States*, 592 F2d 712, 715 (3d Cir 1979). Michigan courts previously have seen through such window dressing. Thus, after questioning whether

[10] BLACK'S LAW DICTIONARY 540 (6th ed. 1991) (500a) (defining injunction as a "judicial process operating *in personam*, and requiring person to whom it is directed to do or refrain from doing a particular thing.")

medical monitoring claims are viable in Michigan, a Michigan circuit court rejected plaintiffs' contention that medical monitoring claims would constitute "final equitable or declaratory relief," ruling that such relief would be solely "an element of damages" and "does not truly involve the award of injunctive relief." *Taylor v American Tobacco Co*, 2000 WL 34159708, *12 (Mich Cir Ct Jan 10, 2000) (678a). Plaintiffs here do not seek to enjoin Dow from any activity or to compel Dow to affirmatively alter its business activity (other than by paying money to Plaintiffs). What Plaintiffs seek is future damages.[11]

Regardless, Plaintiffs' distinction between injunctive and monetary relief elevates form over substance. Whether characterized as an independent cause of action, an injunction, or an item of damages arising from a tort action, the same established principles apply. Plaintiffs' contention that refashioning the remedy as an injunction eliminates the requirement of manifest physical injury, if adopted, would turn the common law on its head. "It is not the remedy that supports the cause of action, but rather the cause of action that supports a remedy." *Wood v Wyeth-Ayerst Labs*, 82 SW3d 849, 855 (Ky 2002). Thus, injury does not flow from damages; damages flow from a legally protected injury. *See, eg,* RESTATEMENT (SECOND) OF TORTS § 902 & cmt a

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[11] *See, e.g., Ball v. Joy Tech Inc*, 958 F2d 36, 39 (4th Cir 1991) ("A claim for medical surveillance costs is simply a claim for future damages."); *Duncan v Northwest Airlines, Inc*, 203 FRD. 601, 611 (WD Wash 2001) (concluding that money was "an integral part of the requested relief" by medical monitoring action seeking a fund established by defendant: "the bottom line is money"); *Thomas v FAG Bearings Corp*, 846 F Supp 1400, 1405 (WD Mo 1994) (rejecting argument that medical monitoring action was equitable explaining that such relief is "nothing more than compensation for necessary medical expenses reasonably anticipated to be incurred in the future").

(531a) ("Damages flow from an injury."). Whether the relief is characterized as legal damages or an injunction, permitting a plaintiff to pursue a medical monitoring cause of action where there is no manifest physical injury would open the courts to the same speculative and uncertain claims.

### D. Public Policy Considerations Weigh Against Adopting A New Claim For Medical Monitoring In Michigan, As The United States Supreme Court Raised In *Buckley*.

For the reasons explained above, the trial court erred by finding that a medical monitoring cause of action could be reconciled with longstanding Michigan law. There is likewise no reason for this Court to depart from those established principles within the confines of this case. Indeed, several high courts – and most notably, the U.S. Supreme Court – squarely have rejected the medical monitoring action after recognizing the difficulties such a new tort would create for the administration of justice. In *Metro-North Commuter RR Co v Buckley*, 521 US 424, 117 S Ct 2113, 138 L Ed 2d 560 (1997), the U.S. Supreme Court surveyed the likely effects of recognizing such an action under the Federal Employers' Liability Act and held, by a 7-2 vote, that "the potential systemic effects of creating a new, full-blown, tort law cause of action" were too severe to tolerate the new tort. *Id.* at 443-44. Those same considerations militate against recognizing a new cause of action for medical monitoring in Michigan.

The plaintiff in *Buckley*, like those in *Meyerhoff*, alleged that he had been exposed to asbestos during the course of his employment and that this exposure subjected him to the increased risk of contracting serious physical ailments. *See id.* at 427. Despite suffering no present physical injury, the plaintiff filed claims under FELA seeking, *inter*

*alia*, to recover for medical monitoring. After the Second Circuit upheld the cause of action, the U.S. Supreme Court granted review to consider "whether the negligent causation of this kind of harm (*i.e.*, causing a plaintiff, through negligent exposure to a toxic substance, to incur medical monitoring costs) by itself constitutes a sufficient basis for recovery." *Id.* at 440. After considering the legal and policy arguments on the subject, the Court refused to interpret federal law to permit a medical monitoring cause of action.

In particular, the Court found four reasons especially compelling: (1) permitting recovery absent a present physical injury would lead to speculative and uncertain claims; (2) medical monitoring claims would overwhelm the courts with a flood of litigation because of the prevalence of chemical exposures in industrial society; (3) courts would have great difficulty defining medical monitoring regimens because there is no medical consensus as to the appropriate medical regimens for particular circumstances or when "extra" monitoring would be appropriate due to exposure; (4) a medical monitoring action would re-allocate scarce medical and judicial resources away from serious claims and toward trivial ones. Those four reasons apply with equal force in the present case.

**1. Permitting tort claims based only upon the risk of future injury would invite "unreliable and relatively trivial claims."**

The U.S. Supreme Court first expressed concern with the medical monitoring tort on the ground that refusing to require plaintiffs to demonstrate a manifest physical injury underlying the medical monitoring tort would lead to a "flood of less important cases," *id.* at 442, or what the Court called "unreliable and relatively trivial claims." *Id.* at 444.

As the Court explained elsewhere in *Buckley*, the common law has long depended upon the requirement that the plaintiff suffer a concrete manifest injury as a way of "separat[ing] meritorious claims from invalid or trivial claims." *Id.* at 433. Absent some clear line defining when a party states a legally cognizable injury, plaintiffs could bring medical monitoring actions based upon the fears of potential diseases that may never develop. The medical monitoring action would expose courts to a host of speculative and minor claims, subjecting defendants to "unlimited and unpredictable liability." *Id.* at 442. Ultimately, it would be the public who would be likely "to pay the higher prices that may result" from such speculative and unnecessary litigation. *Id.* at 435.

As the Court recognized, relying upon an "increased risk" of disease from toxic exposure invites claims not readily subject to limit or proof. Indeed, in this very case, Plaintiffs purport to represent thousands of individuals who have suffered no personal injury from dioxin exposure, but who claim they are at some unspecified "increased risk" of someday developing one or more of various medical conditions, including lung cancer, birth defects, diabetes, increased susceptibility to infectious disease, undefined damage to the liver, thymus, spleen, bone marrow, and lungs, heart disease, acne, dizziness, and depression, and many others. (Third Am. Comp. ¶¶ 133-34: 255a-257a). Plaintiffs request that Dow be ordered to pay their medical monitoring expenses for all of these conditions, presumably for an indefinite period of time. This is so, despite the fact that a given Plaintiff may never suffer from any of these conditions. Moreover, if any Plaintiff ultimately does develop one of these conditions, in all likelihood it would have nothing to do with exposure to dioxin. Plaintiffs do not and cannot allege that such diseases have

any tell-tale markers to identify them as caused by dioxin, as opposed to any assortment of other probable causes. Nor can Plaintiffs show that, even if thousands of residents and former residents are monitored for the rest of their lives, that any individual's future illness or disease could be attributed to his or her theoretical dioxin exposure rather than any myriad of common causes of these conditions. The medical monitoring cause of action thus would provide a vehicle for apparently healthy Plaintiffs to bring an action based upon speculative, open-ended "increased risks" in an effort to recover potentially limitless monitoring costs.

**2. "Tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring."**

*Buckley* recognized that the medical monitoring action is problematic not only because it is so speculative in its content, but also because it is so expansive as to invite litigation from most of the industrialized world. As the Court recognized, "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring." *Buckley*, 521 US at 442; *see Ball*, 755 F Supp at 1372. Every day, as individuals breath the air, do their jobs, eat their food, drink, groom and otherwise engage in their daily lives, they are exposed to hundreds of different "hazardous substances." "[C]ontacts, even extensive contacts, with serious carcinogens are common." *Buckley*, 521 US at 434. If mere exposure to one or more of these were enough to give rise to a legally cognizable injury, then almost every person in the United States would be "injured" on a daily basis.

Moreover, Plaintiffs' litigation theory here could be pursued against the distributors of countless lawful products based upon the fact that those products contain hazardous chemicals or that some level of "toxic wastes" are produced in the manufacture of those products. As *Buckley* recognized, "that fact, along with uncertainty as to the amount of liability, could threaten both a 'flood' of less importance cases ... and the systemic harms that can accompany 'unlimited and unpredictable liability.'" *Buckley*, 521 US at 442. A medical monitoring action would make even minimal exposures legally actionable and, as such, would impose severe burdens on the judiciary and upon the public with little corresponding social gain.

### 3. Identifying medical monitoring claims would pose "special difficulties for judges and juries" because of "uncertainty among medical professionals about just which tests are most usefully administered and when."

*Buckley* further concluded that, once inside the court, the speculative nature of the medical monitoring claims would only compound the problem. The Court observed that for many medical monitoring claims, there was no scientific consensus as to what would be the appropriate medical regimen to monitor a particular condition. Because of this "uncertainty among medical professionals," the medical monitoring action would pose "special difficulties for judges and juries," who would be forced to resolve disputes that divide medical professionals. *Id.* at 442. Indeed, this problem would be further compounded by the fact that the medical-monitoring plaintiff would be entitled only to "***extra*** monitoring costs, over and above those otherwise recommended" even though

there is no scientific consensus on precisely "just which tests are most usefully administered and when." *Id.* at 441 (emphasis in original).

**4. "[T]he potential systemic effects of creating a new, full-blown, tort law cause of action" would "potentially absorb[] resources better left available to those more seriously harmed" and "adversely affect[] the allocation of scarce medical resources".**

The *Buckley* Court also recognized that in a world of scarcity, the resources required by medical monitoring lawsuits inevitably would impose costs upon third-parties. The "flood" of speculative medical monitoring lawsuits would "potentially absorb[] resources better left available to those more seriously harmed." *Id.* at 442. In toxic tort suits, the medical monitoring action would threaten to exhaust judicial resources and the coffers of defendants, leaving correspondingly less available to those suffering actual injuries. Moreover, by establishing "vast testing liability" in advance of the need for actual medical treatment, the medical monitoring action would "adversely affect[] the allocation of scarce medical resources." *Id.* As the Court asked itself elsewhere in the opinion: "In a world of limited resources, would a rule permitting immediate large-scale recoveries for widespread emotional distress ... diminish the likelihood of recovery by those who later suffer from the disease?" *Id.* at 435-36. The same considerations apply to the medical monitoring action itself.

This Court already has recognized the systemic costs that may arise from the expansion of liability to include speculative harms. In *Adkins*, the Court declined to permit a nuisance action in a case where the plaintiff had suffered no actual injury to the property, but the fear of nearby pollution allegedly had resulted in a decline in property

values. The plaintiffs argued that in the absence of a nuisance action, they would be left without a remedy, even though they allegedly had suffered a financial loss that could be attributed to the defendant's misconduct. This Court held, however, that "the ultimate effect might be a reordering of a polluter's resources for the benefit of persons who have suffered no cognizable harm at the expense of those claimants who have been subjected to a substantial and unreasonable interference in the use and enjoyment of property." *Adkins*, 440 Mich at 317-19.

### E. Consistent With The Analysis In *Buckley*, Courts Across Jurisdictions Require A Manifest Physical Injury As A Necessary Prerequisite To Recovery In Tort.

Consistent with the analysis in *Buckley*, the trend among courts addressing claims for medical monitoring is to continue to insist upon allegations of a manifest physical injury. The most recent courts of last resort to confront the question, relying in part upon the reasoning in *Buckley*, refused to expand their tort law by adopting a claim for medical monitoring. Moreover, while the majority of jurisdictions have yet to address such claims, most continue to recognize the fundamental principle that a plaintiff must have sustained a manifest physical injury to pursue an action in tort.

Since *Buckley*, the majority of state supreme courts addressing the matter have found the United States Supreme Court's reasoning persuasive and rejected actions for medical monitoring absent a present physical injury. In *Hinton v Monsanto Co*, 813 So2d 827 (Ala 2001), the Alabama Supreme Court so ruled. As in this case, the plaintiff in *Hinton* sought to recover medical monitoring on behalf of area residents who had been purportedly exposed to pollutants. The plaintiff alleged no present physical injury but

instead claimed that "his need for medical monitoring constitutes a harm sustained by him." *Id.* at 828. After reviewing Alabama and nationwide precedent embracing the same tort principles embedded in Michigan law, however, the *Hinton* court refused to recognize a medical monitoring cause of action. Finding that state law "has long required a manifest, present injury before a plaintiff may recover in tort," the court found that recognizing a medical monitoring claim "would require [it] to completely rewrite Alabama's tort-law system, a task akin to traveling in uncharted waters, without the benefit of a seasoned guide." *Id.* at 830. Relying at length on the United States Supreme Court's analysis in *Buckley*, the court then weighed the public policy arguments both for and against adopting a medical monitoring action for uninjured plaintiffs, and concluded that it could not so fundamentally alter Alabama's tort law:

> [W]e find it inappropriate . . . to stand Alabama tort law on its head in an attempt to alleviate these concerns about what ***might*** occur in the future. We believe that Alabama law, as it currently exists, must be applied to balance the delicate and competing policy considerations presented here. That law provides no redress for a plaintiff who has no present injury or illness.

*Id.* at 831-32 (emphasis in original).

The Kentucky Supreme Court similarly has rejected medical monitoring claims by plaintiffs alleging no past or present physical injury. *Wood v Wyeth-Ayerst Labs*, 82 SW3d 849 (Ky 2002). In *Wood*, the plaintiff sought to create a court-supervised medical monitoring fund for herself and a putative class of claimants to detect possible future disease. Reviewing Kentucky law, the *Wood* court recognized that it had "consistently held that a cause of action in tort requires a present physical injury to the plaintiff." *Id.* at

852. The *Wood* court then looked to more recent Kentucky precedent addressing toxic tort cases which found, as this Court did in *Larson*, that "until such time as the plaintiff can prove some harmful result from exposure . . . his cause of action has yet to accrue." *Id.* (quoting *Capital Holding Corp v Bailey*, 873 SW2d 187, 195 (Ky 1994)). Based upon this survey, the court concluded that "a plaintiff must have sustained some physical injury before a cause of action can accrue. To find otherwise would force us to stretch the limits of logic and ignore a long line of legal precedent." *Id.* at 853-54. Then, like the *Hinton* court, the Kentucky Supreme Court reviewed the policy arguments set forth in *Buckley* and, finding the Supreme Court's decision persuasive, refused to expand Kentucky law to permit a medical monitoring claim. *Id.* at 857-59.

Similarly, in *Badillo v American Brands, Inc*, 16 P3d 435 (Nev 2001), the Nevada Supreme Court rejected a cause of action for medical monitoring for persons with no present physical injury. After surveying the law and recognizing that "creating new causes of action, and providing new remedies for wrongs is generally a legislative, not judicial function," the *Badillo* court declined to create a cause of action for medical monitoring. *Id.* at 440.[12]

In refusing to adopt a medical monitoring cause of action, each of these state supreme courts relied upon the same established tort principles shared with Michigan

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[12] Although *Badillo* did not resolve whether medical monitoring damages might be available to a Plaintiff asserting another cause of action, it emphasized that any such remedy requires a viable underlying cause of action. *Id.* at 440. Moreover, the plaintiffs in *Badillo* never explained when such a remedy might be appropriate absent a present physical injury. *Id.*; *see Badillo v The American Tobacco Co*, 202 FRD 261, 264 (D Nev 2001) (noting that Plaintiffs "failed to demonstrate a viable cause of action to which medical monitoring could properly be tied as a remedy").

law: a cause of action must allege a manifest physical injury. Moreover, like *Buckley*, each decision emphasized that public policy precluded abandoning this fundamental principle, lest the court inadvertently invite a flood of speculative new claims.

Although the highest courts from a handful of jurisdictions have recognized a claim for medical monitoring,[13] even some of these jurisdictions have since sought to limit the reach of this new theory of liability. After the Louisiana Supreme Court had adopted medical monitoring claim, the Louisiana legislature stepped in and prohibited any such a remedy absent a present manifestation of physical injury. La Civ Code Ann art 2315(B) (2003) (502a) (barring damages for "future medical treatment, services, surveillance, or procedures of any kind unless . . . directly related to a manifest physical or mental injury or disease"). Since permitting plaintiffs with no current injury to pursue future medical surveillance damages in *Ayers v Township of Jackson*, 525 A2d 287 (NJ 1987), the New Jersey Supreme Court has clarified that medical monitoring relief would apply only "in a limited context" where the plaintiffs "have suffered increased risk of cancer when directly exposed to a defective or hazardous product like asbestos, when they have ***already suffered a manifest injury or condition*** caused by that exposure, and whose risk of cancer is attributable to the exposure." *Theer v Philip Carey Co*, 628 A2d 724, 733 (NJ 1993) (emphasis added).

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[13] See *Bower v Westinghouse Elec. Corp.*, 522 SE2d 424 (W Va 1999); *Bourgeois v AP Green Indus, Inc*, 716 So2d 355 (La 1998) (superceded by statute); *Redland Soccer Club, Inc v Department of the Army*, 696 A2d 137 (Pa 1997); *Potter v Firestone Tire & Rubber Co*, 863 P2d 795 (Cal 1993); *Hansen v Mountain Fuel Supply Co*, 858 P2d 970 (Utah 1993); *Ayers v Twp of Jackson*, 525 A2d 287 (NJ 1987).

Otherwise, most jurisdictions have yet to address claims for medical monitoring by uninjured plaintiffs. However, the same traditional tort principle embedded in Michigan law requiring a manifest physical injury prevails in the tort law of most jurisdictions.[14] As this Court recognized in *Larson*, other jurisdictions addressing latent injuries also hold that exposure to a toxic agent – without a present manifestation of physical harm – does not constitute a legally cognizable injury necessary to support a tort action. For example, the Third Circuit concluded that even a subclinical change to the body arising from asbestos exposure "is insufficient to constitute an actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law." *Schweitzer v Consol Rail Corp*, 758 F2d 936, 942 (3d Cir 1985). "Requiring manifest injury as a necessary element of an asbestos-related tort action . . . best serves the underlying purpose of tort law: the compensation of ***victims who have suffered***." *Id.* at 942 (emphasis added); *see Urie v Thompson*, 337 US 163, 170, 69 SCt 1018, 93 LEd 1282 (1949) (a worker exposed to a potentially harmful

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[14] *See, eg, Guitierrez v Massachusetts Bay Trans Auth*, 772 NE2d 552, 566 (Mass 2002) (holding that Massachusetts still requires proof of physical harm to recover emotional distress damages); *Temple-Inland Prods Corp v Carter*, 993 SW2d 88, 91-95 (Tex 1999) (holding that damages for fear of future asbestos-related disease are not recoverable absent a present bodily injury); *Mergenthaler v Asbestos Corp of Am*, 480 A2d 647, 651 (Del 1984) (dismissing claims for medical surveillance and mental anguish because plaintiffs alleged no present physical injury); *Amendola v Kansas City SR Co*, 699 F Supp 1401, 1403-06 (WD Mo 1988) (Mo law) (inhalation of asbestos fibers, without proof of a present physical injury, does not constitute sufficient basis for claim); *Rabb v. Orkin Exterminating Co*, 677 F Supp 424, 428 (D SC 1987) (damages for mental anguish are generally not available in absence of a manifest physical injury); *Plummer v Abbott*, 568 F Supp 920, 922 (D RI 1983) ("It is an abecedarian principle of tort law that an individual must be injured to recover for the negligent acts of another."); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 21 (1998) (533a) (limiting compensable "economic loss" to that "caused by harm" to a person or property).

substance is not injured until and unless "'the accumulated effects of the deleterious substance manifest themselves'") (quoting *Associated Indem Corp v Industrial Accident Comm'n*, 12 P2d 1075, 1076 (Ca App 1932)). Likewise, the Supreme Court of Maine concluded that, under "generally applicable principles of tort law . . . a judicially recognizable claim does not arise until there has been a manifestation of physical injury to a person, sufficient to cause him actual loss, damage or suffering." *Berneir v Raymark Indus, Inc*, 516 A2d 534, 543 (Me 1986). Recognizing that persons exposed to asbestos "may in some instances never contract [] a disease," *Bernier* explained that the "actionable harm is the manifestation of disease in the body, not the exposure to the potentially hazardous substance or some more abstract invasion of a person's legally protected interest." *Id.*; *see, eg, AlliedSignal, Inc v. Ott*, 785 NE2d 1068 (Ind 2003) (finding that "it is only when the disease has actually manifested itself . . . . that the cause of action accrues"); *Locke v Johns-Manville Corp*, 275 SE2d 900 (Va 1981)("Simply put, legally and medically there was no injury upon inhalation of defendants' asbestos fibers."); *Morrissy v Eli Lilly & Co*, 394 NE2d 1369, 1376 (Ill App Ct 1979) (holding that "exposure to DES *in utero* and the possibility of developing cancer or other injurious conditions in the future is an insufficient basis upon which to recognize a present injury").

In fact, numerous federal courts have rejected claims for medical monitoring where the plaintiff has not sustained a manifest physical injury recognizing that such

claims would require a radical departure from governing state law.[15] *See, eg, Ball*, 958 F2d 36, 39 (declining to "expand the law of torts" by recognizing a medical monitoring claim on behalf of plaintiffs with no injury); *Duncan*, 203 FRD at 605-06 (refusing to recognize medical monitoring action after noting that the "Washington Supreme Court has traditionally deferred to the state legislature for the creation of new causes of action"); *Rosmer v Pfizer, Inc*, 2001 WL 34010613, *5 (D SC Mar 30, 2001) (668a) (finding that the Plaintiff "could not himself be eligible for the recovery sought" in medical monitoring action because South Carolina has not recognized such a claim); *Jones v Brush Wellman, Inc*, 2000 WL 33727733, *7-8 (ND Ohio Sept. 13, 2000) (663a-664a) (dismissing medical monitoring claims because Tennessee law requires a present injury or loss); *Witherspoon*, 964 F Supp 455, 467 (D DC 1997) (DC law) (dismissing medical monitoring claim, in part, because "[w]hether a cause of action or part of damages requested, medical monitoring requires that the plaintiff have a present injury"); *Thomas v FAG Berrings Corp*, 846 F Supp 1400, 1410 (WD Mo 1994) (Mo law) ("Entitlement to the costs of future medical monitoring requires plaintiff to prove actual

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[15] While Plaintiffs contend that federal courts have interpreted the law of eight jurisdictions to permit claims for medical monitoring, (Pls. Sup. Ct. Answer at p. 15: 455a) these same cited decisions addressing the law of at least four jurisdictions permitted such relief ***only*** to plaintiffs who sustained present physical injuries. *See Ball*, 958 F2d at 39 (Va law); *Witherspoon v Philip Morris Inc,* 964 F Supp at 455, 467 (D DC 1997) (DC law); *Burton v RJ Reynolds Tobacco Co*, 884 F Supp 1515, 1523 (D Kan 1995) (Kan law) (permitting plaintiff to pursue medical monitoring damages arising from alleged vascular disease); *Bocook v Ashland Oil, Inc*, 819 F Supp 530, 537 (SD W Va 1993) (Ky law). Although *Bocook* reluctantly predicted that the Kentucky Supreme Court would hold that exposure and a significant increased risk of disease constitute "physical harm," this prediction proved wrong; both the Kentucky appellate court and Supreme Court subsequently ruled that a manifest physical injury is required. *Wood*, 82 SW3d 849, 855 (Ky 2002).

present injury and in increased risk of future harm."); *Carroll v Litton Sys, Inc*, 1990 WL 312969, at *51-60 (WD NC Oct 29, 1990) (619a-624a) (predicting that North Carolina courts would refuse to countenance claims for medical monitoring absent a present physical injury); *Purget v Hess Oil Virgin Islands Corp*, 1986 WL 1200, *4 (D VI Jan 8, 1986) (dismissing medical monitoring claims in light of "the Restatement's rule that actual injury is an indispensable element of a tort cause of action").

Plaintiffs' claims for medical monitoring, where they have sustained no manifest physical injury, if recognized, would constitute a novel cause of action that contravenes established principles embedded in Michigan law, as well as the majority of jurisdictions outside Michigan. Moreover, addressing the policy implications of such a departure, courts increasingly have rejected such speculative and unfounded claims.

### F. Recognition Of Any New Claim For Medical Monitoring Should Be Left To the Legislative Process.

At bottom, Plaintiffs' attempt to establish a new theory of liability – one that departs from established common law principles, is fraught with uncertainty, and requires the balancing of competing policy objectives – is nothing more than a request for legislation, and one that is better directed to the Legislature.

The Michigan Constitution specifically provides for a separation of powers between the legislative, executive, and judicial branches of government. Const 1963, art 3, § 2. The primary function of the judiciary is to construe and apply the laws enacted by the Legislature and to hear and decide controversies concerning those laws. *See Johnson v Kramer Bros Freight Lines, Inc*, 357 Mich 254, 257-258; 98 NW2d 586 (1959) ("In

*Risser v Hoyt*, 53 Mich 185, 193; 18 NW 611, 615 (1884) it is said: 'The judicial power referred to is the authority to hear and decide controversies, and to make binding orders and judgments respecting them.'"). As this Court recently recognized, "[t]he role of the judiciary is not to engage in legislation." *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 101-102; 643 NW2d 553 (2002).

In *In re Manufacturer's Freight Forwarding Co*, 294 Mich 57, 63; 292 NW 678 (1940), the Court explained the essential distinction between legislative and judicial acts:

> The Legislature makes the law; courts apply it. To enact laws is an exercise of legislative power; to interpret them is an exercise of judicial power. To declare what the law shall be is legislative; to declare what it is or has been is judicial. The legislative power prescribes rules of action. The judicial power determines whether, in a particular case, such rules of action have been transgressed. The Legislature prescribes rules for the future. The judiciary ascertains existing rights.

Thus, while it is no doubt true that this Court has the constitutional authority to modify the common law to recognize causes of action in areas in which the Legislature has not expressly acted, the Court traditionally has proceeded with caution when exercising its common law powers and deferred to the Legislature on matters involving public policy. For example, in *Glancy v City of Roseville*, 457 Mich 580; 577 NW2d 897 (1998), this Court relied primarily on separation of powers concerns in refusing to adopt a bright-line rule that sidewalk defects of two inches or less do not constitute a lack of "reasonable repair" under Michigan's governmental immunity statute. In so holding, the Court emphasized, in part, that the Legislature is better-equipped than the judiciary to make a policy decision concerning whether to adopt such a rule:

> In support of adopting the two-inch rule, defendants cite the great expense to municipalities of defending lawsuits for injuries arising out of sidewalk defects of two inches or less. The Legislature, with its ability to consider testimony from a variety of sources and make compromise decisions, is much better positioned than the judiciary to consider such policy arguments and make policy choices. "The responsibility for drawing lines in a society as complex as ours – of identifying priorities, weighing the relevant considerations and choosing between competing alternatives – is the Legislature's, not the judiciary's."

*Id.* at 590 (citation omitted). Similarly, in *Beaudrie v Henderson*, 465 Mich 124, 140; 631 NW2d 308 (2001), the Court declined to extend the "public duty doctrine"[16] to protect governmental employees other than police officers who are alleged to have failed to protect a person from the criminal acts of a third party because to do so would undermine the Legislature's policy choice "that a defendant's status as a governmental employee alone does not preclude liability." *See also McDougall v Schanz*, 461 Mich 15, 35; 597 NW2d 148 (1999) (recognizing the Legislature's unique expertise in making broad policy choices in setting restrictions on expert testimony in medical malpractice cases).

In *Sizemore v Smock*, 430 Mich 283; 422 NW2d 666 (1988), this Court likewise declined to recognize a parent's action for loss of her child's society and companionship

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[16] In its earlier decision in *White v Beasley*, 453 Mich 308; 552 NW2d 1 (1996), this Court had adopted the following articulation of the "public duty doctrine":

> [I]f the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages.

*White*, 453 Mich at 316 (quoting 2 COOLEY, TORTS (4th ed), § 300, pp 385-386).

when the child was negligently injured primarily because such an extension of traditional concepts of tort liability "involves a variety of complex social policy considerations." *Id.* at 299. In light of those concerns, the Court held that "the determination of whether this state should further extend a negligent tortfeasor's liability for consortium damages should be deferred to legislative action rather than being resolved by judicial fiat." *Id.* This is the same concern that led this Court in *Adkins v Thomas Solvent Co*, 440 Mich 293; 487 NW2d 715 (1992), to refuse to permit recovery for property depreciation caused by unfounded fears of ground water contamination:

> [W]hile we acknowledge that the line drawn today is not necessarily dictated by the spectral permutations of nuisance jurisprudence, if the line is to be drawn elsewhere, the significant interests involved appear to be within the realm of those more appropriate for resolution by the Legislature.

*Adkins*, 440 Mich at 318-319.

As in *Glancy, Beaudrie, Sizemore and Adkins*, the decision presented in this case – whether to create a cause of action for medical monitoring damages that does not exist at common law – involves the sort of cost-benefit analysis and balancing of complex policy considerations that should be reserved for the Legislature. Indeed, other state supreme courts recently refusing to recognize claims for medical monitoring have done so in deference to the legislative process. In *Badillo v American Brands, Inc*, 117 Nev 34; 16 P3d 435 (Nev 2001), the Supreme Court of Nevada declined to recognize a claim for medical monitoring damages because "[a]ltering common law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative, not a judicial, function." *Id.* at 42. Likewise, in *Wood v Wyeth-Ayerst Laboratories*, 82 SW3d 849 (Ky

2002), the Kentucky Supreme Court rejected a cause of action for medical monitoring because "such a remedy is best left to the legislatures":

> [F]irst, legislatures are in a better position than courts to acquire all of the relevant information in making such a complex and sweeping change to traditional tort law; second, legislatures' prospective treatment of medical monitoring awards would provide fair notice to potential tortfeasors; and third, claims involving collateral compensation demand careful consideration from the legislature.

*Id.* at 858 (citing Schwartz et al., *Medical Monitoring – Should Tort Law Say Yes?*, 34 Wake Forest L R 1057 (1999) (547a-572a)).

This Court should follow the lead of other state Supreme Courts like in Nevada and Kentucky and leave recognition of medical monitoring claims to the legislative process. Such deference is especially appropriate here because the Legislature is already extensively involved in the field of environmental protection as evidenced by the enactment of the comprehensive Natural Resources and Environmental Protection Act. MCL 324.101 *et seq.* This Court should defer to the legislative branch as to whether medical monitoring damages may be recovered as a result of alleged contamination without proof of an actual injury. *See Beaudrie*, 465 Mich at 140 (declining to extend the common law public duty doctrine in light of the Legislature's enactment of the government immunity statute). The recognition of a claim for medical monitoring damages where no identifiable, physical injury has been suffered presents broad policy issues that are far better suited for the legislative arena than for judicial determination.

## IV. CONCLUSION

The trial court's August 18, 2003 Order clearly erred when it denied Dow's motion for summary disposition of Plaintiffs' medical monitoring cause of action. Plaintiffs not only have failed to allege that they sustained any manifest physical injury but they also repeatedly have conceded that they have sustained no such injury. By permitting Plaintiffs to pursue their medical monitoring claims even though they have sustained no physical injury, the trial court's Order manifestly departs from established Michigan law precluding claims absent proof of a manifest physical injury. Moreover, there is no authority in Michigan recognizing, and this Court should not create, a new tort of medical monitoring permitting claims based exclusively on allegations that Plaintiffs face an "increased risk" of some disease or other condition that Plaintiffs might suffer sometime in the future.

Therefore, the trial court's August 18 Order denying Dow's dispositive motion as to the medical monitoring claims was manifestly erroneous and should be reversed under MCR 7.211(C)(4), and this Court should directly dismiss as a matter of law Plaintiffs' medical monitoring claims.

Respectfully submitted,

DICKINSON WRIGHT PLLC

By: Barbara H. Erard

KATHLEEN A. LANG (P34695)
BARBARA H. ERARD (P31892)
*Counsel for Defendant-Appellant*
500 Woodward Avenue, Suite 4000
Detroit, MI 48226

Telephone: (313) 223-3500

JOHN A. DECKER (P31078)
BRAUN KENDRICK
FINKBEINER, PLC
*Counsel for Defendant-Appellant*
4301 Fashion Square Boulevard
Saginaw, MI 48603
Telephone: (989)-498-2100
Facsimile: (989)-799-4666

DOUGLAS KURTENBACH
CHRISTOPHER M. R. TURNER
STEVEN ENGEL
KIRKLAND & ELLIS, LLP
*Counsel for Defendant-Appellant*
200 East Randolph Drive
Chicago, Illinois 60601
Telephone: (312)-861-2000
Facsimile: (312)-861-2200

JOHN S. GUTTMAN
BEVERIDGE & DIAMOND, PC
*Counsel for Defendant-Appellant*
1350 I Street, NW, Suite 700
Washington, DC 20005-3311
Telephone: (202)-782-6000
Facsimile: (202)-789-6190

MICHAEL A. GLACKIN
THE DOW CHEMICAL COMPANY
*General Counsel*
2030 Dow Center
Midland, MI 48674

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